UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS,
COMMUNICATION WORKERS OF AMERICA, AFL-CIO, CLC
(IUE-CWA, LOCAL 301)

- and -

CASE 03-CB-146489

VON ROLL, U.S.A., INC.

POST-HEARING BRIEF OF RESPONDENT
IUE-CWA, LOCAL 301

INTRODUCTION

Respondent IUE-CWA, Local 301, submits this post-hearing brief, pursuant to a trial held before the Honorable Robert A. Ringler, Administrative Law Judge, on January 19 and 20, 2016.

STATEMENT OF THE CASE

This case involves a dispute between the charging party, Von Roll USA, Inc. (the "Company") and Respondent IUE-CWA, Local 301 ("Local 301" or the "Union") regarding whether there was a meeting of the minds over a collective bargaining agreement ("CBA"). The Company alleges that there was a meeting of the minds and the Union responds that there was not.

A. Background

Local 301 represents a bargaining unit of employees at the Company's plant in Schenectady, New York. The Company makes insulating material for power generation. (*See* testimony of Anthony Brown, transcript ("Brown, Tr.") at 28:22-23.) The bargaining unit consists of 90-100 employees (*Id*. at 30:24 to 31:4) and the Union has represented the bargaining unit at the Company's Schenectady location for over 25 years. (*Id*. at 30:6-10.) The Union and the Company had been parties to a series of CBAs, the most recent of which had covered the period October 1, 2010 through September 30, 2013. (*See* Ex. GC-2, the "2010-2013 CBA.") Article VIII, Section 3 of the 2010-2013 CBA, entitled "Wage Rates and Cost of Living Adjustments," set forth as follows:

Step Rates and Progression Schedules

> The Union recognizes that starting rates, progression rates, and job rates for hourly rated will vary, depending on the job and its surrounding circumstances. Employees hired after January 1, 2011 will follow the progression rates and job rates in effect as of January 1, 2011.

> Employees hired before December 31, 2010 will follow the progression rates and job rates presently in-effect.

(Ex. GC-2, p. 6-7.)

B. <u>2013 Collective Bargaining Begins</u>

During the summer of 2013, the Union and Company commenced negotiations for a renewed collective bargaining agreement for the 2013-2016 term (the "2013-2016 CBA"). The 2010-2013 CBA was set to expire in September of 2013. (*See* Ex. GC-2, p. 34; *see also* Brian Sullivan, Tr. at 387:15-19.) The parties agreed to extend the term of the 2010-2013 CBA to October 31, 2013. (*See* Ex. GC-5.)

On the Union's negotiation committee were: Brian Sullivan, the Business Agent for Local 301 and its highest ranking official; Carmine Pallotolo, the Union's President; and John Stewart, an Acting Board member for the Union at the Company's Schenectady facility. (Sullivan, Tr. at 388:9-15.) The three Union negotiators attended all the bargaining sessions. (Jon Roberts, Tr. at 289:19 to 290:1.) The Company's negotiation committee consisted of: Jon Roberts, the Company's Chief Operating Officer; Anthony Brown, Production Manager; Matt Couture, Head of Finance; and Kiersten Dellert, the Company's Human Resources Manager. (Brown, Tr. 39:17-22; Roberts, Tr. at 282:20-23.) Except for Kiersten Dellert, the members of the Company's negotiation committee also attended all the bargaining sessions. Ms. Dellert missed the last few sessions (Roberts, Tr. at 353:16-18), although she was charged with keeping the Company's notes and tracking changes to CBA drafts (Brown, Tr. at 43:14-16; Roberts, Tr. at 289:6-11.) Witnesses for the Union and the Company provided different estimates for the number of bargaining sessions that were held during negotiations. (Brown, Tr. at 41:11-12 (eight or nine sessions); Sullivan, Tr. at 388:3-8 (14-18 sessions).)

Early in the negotiation process, the Company proposed to the Union that the parties

review the CBA closely, "line by line," and edit the existing language to update it and clean it up (Roberts, Tr. at 287:10-18; Couture, Tr. at 359:11-14), an undertaking that the Company often referred to as "housekeeping" (*see* Couture, Tr. at 359:11-14; Roberts, Tr. at 290:2-4, 314:25 to 315:10, 337:12-23; *see also* Ex. GC-10, p. 3.) The Company felt strongly that the language of the 2010-2013 CBA was unclear and inaccurate in some places and, despite the Union's initial reluctance to do so, wanted to spend some time during the first bargaining sessions to review the language and apply corrective and clarifying changes. (Roberts, Tr. at 287:10-18.) Jon Roberts testified that the parties sometimes had "in-depth" discussions on the language of certain contract items. (*Id*. at 288:13-20.) This process of straightening out the wording was to last throughout the negotiation period to the very end. (Roberts, Tr. at 317:3-13; *see also* Ex. GC-10, p. 3 (Roberts Oct. 24, 2013 email: "The wording changes to the contract is still a housekeeping open topic.")

As set forth in Article VIII, Section 3 (quoted above), 2010-2013 CBA provided for a series of wage rate increases for certain new hires at the Company. "Progression step" increases in the wage rate of these new hires were set to occur after six, twelve, and eighteen months of service. Depending on when a person was hired, and his or her starting rate, the progression step increase under this schedule averaged approximately $2.75 per hour. Thus, under the wage schedules of the 2010-2013 CBA an employee hired after January 1, 2011 at the "9" rate of $18.37 would expect to make $26.21 in a year-and-a-half. (*See* Ex. GC-6, p.2.) This wage schedule was one that the Union found favorable for its membership and when the 2013 negotiations commenced, Brian Sullivan's approach was, "Don't fix what's not broken." (Sullivan, Tr. at 388:21-22.) Sullivan's view was conveyed early on to the Company, as evidenced by a series of summaries the Company prepared on the early bargaining sessions, wherein a summary of the first meeting on July 25, 2013 said: "Brian stated several times

throughout this meeting that they do not have interest in changing the contract language or making any big changes. It is his/union's opinion that we have a solid contract that is working. In his words 'We are not looking to re-create the wheel.'" (Ex. R-1, p. VR-0664; *see also* Brown, Tr. at 182:5-18.) The Company, therefore, was on notice from the first day of negotiations that the Union had little interest in making substantive changes to the 2010-2013 CBA.

C. The Certification Program

Also early in the negotiations—the first or second session—the Company introduced what it had been calling a Cross-Training Certification Program (the "Certification Program"). (Roberts, Tr. at 293:16 to 294:13.) The Company wanted to be more competitive and Roberts saw the Certification Program as a component to achieving that goal. (*Id*. at 285:1-16 and 295:1-7.) The Certification Program offered an opportunity for new hires to increase their wage rates by becoming certified in various processes at the Company. The Company's objective was to have the Certification Program replace the progression step increases. This proposed change would have marked a significant departure from the progression step increases as under the Certification Program it would take several years to achieve a pay rate comparable to that which new hires could reach in 18 months under the terms of the 2010-2013 CBA.

Pay-for-skill certification programs like the one proposed by the Company are not new to the Union. The Union welcomed the opportunity to discuss the development of such a program. (Brown, Tr. at 48:4-10.) The Union saw the benefits of a program that would incentivize new learning skills and foster a more versatile workforce, made all the better by the opportunity to earn an increase in pay for the acquisition of skills. The Union's negotiating committee expressed that the Union was interested in discussing the development and implementation of a certification program. (Sullivan, Tr. at 398:4-14, 413:4-5.)

At one of the negotiation sessions, the Company presented an outline of its proposed

Certification Program (Ex. GC-3), but candidly acknowledged that the document they provided to the Union was "kind of just a general guideline." (Brown, Tr. at 49:12-14.) The Company further acknowledged that the program it was proposing was "in its infancy," and admitted that the Company was still in the process of "putting this together." (*Id*. at 96:14-20.) It was evident that details of the program were still being worked out at the time of the negotiations. To date, the Company's Certification Program is still a work in progress, still being developed. (Brown, Tr. at 238:14-17.) The Union asked questions about how the Certification Program would work and while the Company provided some answers, it was understood by the parties that the program was still being developed. The Union, while expressing interest in continued discussions about the Certification Program, objected to including the new program in the 2013-2016 CBA, especially if the new program—undeveloped as it was—was going to replace the progression step increases.

The Union remained interested in continuing discussions about developing the Certification Program, but did not want the proposed program to be included as a feature of the 2013-2016 CBA. The Union took the position early on that discussions about the proposed program should continue outside of negotiations for the 2013-2016 CBA. Brian Sullivan made clear that he "didn't want it as part of the contract language." (Sullivan, Tr. at 417:8-9.) Sullivan testified regarding his concern with the program as proposed by the Company, explaining as follows:

> I want it to be a separate plan that we could tweak as we needed. Now I'll guarantee you from the first time that they talked about a certification program in the shop to today, it's been tweaked 10 times. If you put it in black and white, it's part of contract item. You don't tweak. You follow the rule that allows us no tweak ability, apparently. I still like the idea and I'm willing to talk to the Company after we conclude. It just can't be part of the contract because it changes.

(Sullivan, Tr. at 417:11-18; emphasis added.)

Negotiations continued into the fall of 2013. The Company started a practice of producing a series of charts that purported to summarize the positions of the parties as negotiations progressed. (*See* Exhs. GC-7, GC-8, GC-9, and GC-13.) The chart-summaries were prepared by the Company's Chief Operating Officer Roberts in his office (*see e.g.* Roberts, Tr. at 299:8-12, 305:18-19.). Each chart-summary purported to show certain topics of discussion during the negotiations on which the parties agreed or disagreed. Check marks on the charts purported to report those topics on which the parties agreed and were resolved, while "X's" were used to show those issues on which the parties did not agree. (*See e.g.* Ex. GC-7.) However, the charts Roberts produced reflected the Company's understanding of what was resolved, which was not always the Union's understanding. For example, when asked about whether a check mark next to "Certification" reflected agreement by both parties that such a program would be put in place, Roberts responded as follows:

> Q: You said that when there were checks across the board, your testimony was that the issue was agreed and off the table?
> A: For us it was agreed, for the Company.
> Q: What if there's one check? What's the difference?
> …
> A: That would be across the board. …

(Roberts, Tr. at 346:1-16; emphasis added.)

Brian Sullivan testified that the charts summarizing proposals that were created by Jon Roberts did not necessarily reflect the Union's position on any matter:

> Q: What did you understand the checks to mean?
> A: To be perfectly honest with you, based on—if we're still talking about GC-7, that was the first document that we got in this format. So, the checks and the 'x's weren't significant to me. They are to me what possibly Von Roll thought were solved. It's still a work in progress.
> Q: Well, let's start with the checks. What did you understand the checks to mean?
> A: I really didn't have any significant opinion one way or the together [*sic*]. They didn't matter to me. You know—those are things that they

may have wanted or agreed to, but the whole document is still a work in progress.
Q: What did you understand the 'x's to end up to be?
A: Based on the conversation that they shared with me, those are things that they didn't want and the checkmarks were things that they did. …

(Sullivan, Tr. at 402:6-15.)

The check mark that was placed on the chart summaries next to "Certification" remained there until the last such document that Roberts provided to the Union on November 1, 2013, the day after the parties' last negotiation session. Sullivan, in response to questions put to him by Administrative Law Judge Ringler, clarified again that the check marks on the chart-summaries did not necessarily indicate the Union's agreement:

Judge Ringler: So, your view of this—tell me if I'm correct—is that basically on November 1 they're offering you this package. We can do all of these things and if you sign off on all of the green checkmark items, then we have a deal basically—from their perspective?
A: From their perspective, yes.
Judge Ringler: Right, from their perspective—and if you they said [*sic*], "Okay, terrific," and you're saying that you didn't, but if you said, "Okay, terrific," then you've got a contract.
A: We certainly do.
Judge Ringler: Okay, I understand what you're saying.

(Sullivan, Tr. at 408:16 to 409:2.)

There was, therefore, a marked difference of opinion during negotiations between the Union and the Company about what issues were resolved and what issues remained disputed.

Throughout the negotiations, the Union remained steadfastly opposed to the Certification Program as it was proposed. The Union's negotiation team requested more information about how the program would work. (Sullivan, Tr. at 410:12-15.) The Union wanted to know such details as: (1) who was going to be trained and on what machines (Sullivan, Tr. at 411:5-14), (2) how the proposed program would affect seniority (*Id.*), (3) whether the program would provide equal certification opportunities for employees who worked on different machines (*Id.*), (4) how

the proposed program would affect overtime opportunities (Carmine Pallotolo, Tr. at 514:9-12), and (5) who would train and certify employees (Sullivan, Tr. at 413:6-20). Since the proposed program was still in development, certain of these key questions remained unanswered. (Pallotolo, Tr. at 514:13 to 515:15.)

D. <u>The Certification Program is An Undeveloped Work in Progress</u>

All the Company's negotiating witnesses candidly acknowledged, several times, that the Certification Program was in its infancy, was still being developed, and various details of the program still needed to be worked out. Brian Sullivan testified similarly.

(1) <u>Anthony Brown</u>

- Regarding the outline provided during the bargaining (Ex. GC-3), Brown said that, "This was kind of just a general guideline." (Brown, Tr. at 49:14.)

- "[W]e agreed several times that we needed to develop this further and invited them to give input on this as well." (*Id*. at 71:1-3.)

- When asked about what the Union was told regarding the details of the program:

  Q: … And did you or anyone else from the company inform the Union that you did not know all the details of the certification program yet?
  A: Yes.
  Q: What was said about that?
  A: That we were still putting—this is in its infancy. So we were putting this together.

  (*Id*. at 96:14-20.)

- When asked about other information provided to the Union regarding the program:

  Q: And at any time during negotiations did the company convey to the Union that the certification program would in fact consist of the numerous documents you named such as handouts and other materials that Mr. Napoli uses?
  A: Yes.
  Q: And who was that conveyed to the Union?
  A: Because we talked about there would be so much—there would be a lot of material involved in this.
  Q: And did that material exist or not exist as of the fall of 2013?

A: No it did not.

(*Id*. at 264:4-14.)

- Also, Paul Napoli, the person that the Company had decided would sign off on the certifications, and who had helped initiate the program, did not even work at the facility at the time that the negotiations were progressing. (Brown, Tr. at 242:4 to 243:12.) Napoli was retired and was brought back to work at the Company in January of 2014, two months after negotiations had ended. (*Id*.)

(2) Jon Roberts

- In response to a question regarding whether the parties discussed who would have the opportunity to be certified first, Roberts replied: "Yes—I mean—you know—one of the things that we pointed out first of all, we needed to develop the program. So that was pointed out here in this document. We needed to develop the program. We needed a year to do it—in our estimation at least a year. …" (Roberts, Tr. at 307:12-16; emphasis added.)

- Describing what he meant by a "living document," Roberts said: "Well—you know—the whole certification program is a living document in our mind. And I'm sure that this will obviously be a thing going forward as to refining whatever we're doing here in future contracts." (*Id*. at 313:15-18; emphasis added.)

- Regarding whether the details of the Certification Program were to be included in the contract:

> I think that we were in agreement that we were comfortable having it referenced within this document and that there were other documents. And the certification document itself—you know—is in the process of being developed and that's why we had asked for the one year period to develop the whole program. So it was going to be a living document and that was going to change on a very regular basis—you know—as we had equipment being added and so forth.

(*Id*. at 326:23 to 327:5.)

- The Certification Program was still being developed as the new contract supposedly went into effect and into January 1, 2014. (*Id*. at 344:18-24.)

(3) Matt Couture

> Q: During the time of negotiations in 2013 was there a fully developed Certification Program at that time?
> A: Fully developed, no.

(Couture, Tr. at 362:3-5.)

(4) Brian Sullivan

- Testified that the Union never saw a complete presentation of how the Company's Certification Program would work: "In my opinion we never got to it and I have never in its entirety seen a package that showed me how to work [*sic*]. Mr. Roberts attested that this is a work in motion and his suggestion was I was going to vote on something that I couldn't see." (Sullivan, Tr. at 410:19-23.)

- On the same issue: "So it would have been impossible for me to make a decision on a process that I didn't have full knowledge of." (*Id*. at 414:9-10; emphasis added.)

Because so many aspects of the proposed Certification Program remained unknown, Sullivan and other Union negotiators objected strongly to its inclusion as a binding contract provision. Sullivan made this clear when he testified that, "As far as I'm concerned, this live document has never been nor should be any part of my Bargaining Agreement. I never agreed to it. I never did. I never will." (Sullivan, Tr. at 424:21-23.)

E. The Union Remains Opposed to the Certification Program

In late October, as negotiations began to wind down and the parties were approaching the end of the process, the Company emailed Brian Sullivan with a summary of the Company's proposals at that time. The October 24 email message from Roberts to Sullivan concerned a few issues, including medical benefits, the pension, and the Certification Program. The October 24 email starts with, "Please review our comments and proposal below," and noted as follows regarding the Company's proposed Certification Program:

> We agree that the Certification process is a means of improving our common Goal for operational flexibility. Currently, the pay rate for the membership job classification is at the 75 percentile for the area. We have proposed that we modify the pay rate progression for new hires using the certification criteria as a means of advancing the member's knowledge and wages. When we discussed the 2 tier approach in the past, your most important point was that we give the new hires the opportunity to achieve a level similar to what the current employees make. New Hires will start at the 9 rate. The table below doubles the value of each earned certificate for the new hires over the original proposal.

(Ex. GC-10, p. 2.)

On the morning of October 25, Brian Sullivan responded to Roberts' October 24 email with a message that unequivocally expressed the Union's disagreement with Roberts' statements:

> Are you kidding me? Every time you give us a counter proposal, it's worse than the last! We agreed that the Certification process was a supplemental issue. I am NOT going to be held hostage by this issue … We will not waiver from the last proposal. Get it together or we will act accordingly!! Prepare for the worst! My next call is to your boss.

(Ex. GC-11, p. 1; emphasis added.)

Later that day, on October 25, Roberts emailed Sullivan again, this time with a bullet-pointed list of the "main points" of his October 24 email, and saying: "We feel confident that the Membership will accept this very fair offer along with the other components outlined in our Oct. 24, 2013 e-mail. No exceptions." (Ex. GC-12.)

Sullivan testified about what he meant by "supplemental issue" in his response to Jon Roberts:

> Q: Well, then I would ask what did you mean that "we agreed that the Certification Process was a supplemental issue"?
> A: I guess that I'll reiterate again. It's of my opinion that I would be more than happy to sit down, willing, talk, help, assist, expedite, process, install, implement—whatever word you want to come up with a Certification Program that best help myself, my Members, and their business outside of the contract because I cannot change features in the contract. I don't get to tweak, pick, or poke at them.
>
> When you read the contract item it's in black and white. It says this is what happens today and that continues on until the next negotiation. You don't get to tweak something in the contract negotiations. This process requires it to be tweaked.

(Sullivan, Tr. at 429:1-13.)

Sullivan's explanation succinctly summarized the Union's concerns regarding the proposed Certification Program: (1) the Union was interested in discussing the development of such a program as it recognized the program's potential benefits to both employees and the

Company; (2) however, including the program in the 2013-2016 CBA would lock the Union into accepting a regime that, at least in its current form, would require further development moving forward. Hence, the Union's stated objection to contractually committing to such a program and the Union's preference to continue discussing its development outside of the contract.

The Company claims that it understood "supplemental issue" as follows:

> Q: [I]sn't it true that as late as October 25th the Union maintained its position that any proposed certification program was to remain outside of the contract?
> A: Yes, as a—
> Q: Isn't that true?
> A: —supplemental issue, yes.
> Q: Well, can I ask what you mean by a supplemental issue?
> A: That—when we talked about it, that we could make reference to it in the contract, but we couldn't put specifics in the contract.

(Brown, Tr. at 192:9-24.)

Roberts had this to say about what he believed was agreed:

> It was agreed that we would put the wording changes—you know—we would put the wording in to reflect the certification and the documentation. And it was agreed in the agreement and my email prior to that, which referred to that, was that we would keep the actual wage structure out of it. In other words, the dollar per six certification and all of that sort of stuff, that would be kept out of it and that would be a separate document, just like we currently keep the Step Progression in a separate document.

(Roberts, Tr. at 326:3-11.)

F. Negotiations End

The parties met for the last negotiation session on October 31, 2013. (Brown, Tr. at 104:3-5; Roberts, Tr. at 316:16-19.) According to the Company, there were no unresolved issues at the October 31 session. (Brown, Tr. at 104:10-12.) According to the Union, however, at the last session there remained some unsettled questions. First, there remained what the Union believed to be some minor housekeeping with regard to wording—"housekeeping glitches,"

according to Brian Sullivan, "taking out words like [']a['], [']and['], [']the[']." (Sullivan, Tr. at 421:1-19.) Second, there remained the issue of the Company's proposed pension freeze for new hires, a proposal to which the Union agreed at that last session. (*Id*.) Last, was the still-standing proposal by the Company for a Certification Program. (*Id*.)

According to Brian Sullivan, by the time the parties had convened for the last negotiation session, the Certification Program "wasn't on the table in my opinion. I never got the documentation that I needed to make a decision." (*Id*. at 433:9-15.) Sullivan made clear that from the moment the Union expressed that it would consider the proposed Certification Program, but not for the 2013-2016 CBA, to that last negotiation session on October 31, the position of the Union remained the same: it was opposed to implementing the Certification Program in the new contract. (*Id*. at 423:16-21.) Union President Carmine Pallotolo echoed that position; according to Pallotolo, the Union told the Company that it was not interested in the Certification Program, since the Company could not provide satisfactory answers to the Union's questions and concerns about the proposed program. (Pallotolo, Tr. at 511:14-22.) According to Pallotolo, at no point did the Union withdraw its objection to implementing the Certification Program for the 2013-2016 CBA term:

> Q: Did the Union's position regarding the Certification Program ever change throughout the negotiation sessions?
> A: No.

(Pallotolo, Tr. at 515:19-21.)

The Union, therefore, was convinced that its message was clearly communicated; based on its representations throughout the negotiations, it had no reason to believe otherwise. And so at that last session on October 31 the parties shook hands and the Union thought that it had an agreement to take back to the membership for a vote. (Sullivan, Tr. at 421:6-11.)

Importantly, the Company acknowledged that at the last session on October 31, there still was not a final, printed draft of the 2013-2016 CBA. (Brown, Tr. at 104:24 to 105:1; Roberts, Tr. at 317:3-5.) Sullivan also confirmed that at this last meeting he "had not seen a clear and concise document with all of the changes" that the parties discussed throughout the bargaining sessions. (Sullivan, Tr. at 421:20-24.) Nevertheless, Sullivan was confident that the minor wording issues that remained "would be cleaned up and emailed to me so that I could view them and make sure they were done properly," as, according to Sullivan, the housekeeping changes that remained outstanding were "simple." (*Id*. at 422:9-16.)

After the October 31 session, the Union presented a summary of newly agreed-upon contract terms for the 2013-2016 CBA to its membership for a vote. (Sullivan, Tr. at 431:7 to 432:3; *see* Ex. R-19.) This "highlight sheet" (*Id*.), of course, did not include the Certification Program as one of the new provisions of the proposed 2013-2016 CBA. Sullivan made clear that when presenting the highlight to the members for a vote, "I have to put everything that I agreed to on paper so that they can review it." (Sullivan, Tr. at 490:2-3.) When asked why the Certification Program was not an item on the highlight sheet distributed to the membership, Sullivan explained:

> Q: … Is there anything in Respondent's Exhibit R-19 [the highlight sheet] regarding a Certification Program?
> A: There is not.
> Q: Why not?
> A: Because we didn't negotiate it. We talked about it forever. It never was a negotiated item.
> Q: Would it have been there if it was something that the Union Committee agreed should be in the contract?
> A: Yes.

(Sullivan, Tr. at 432:15-23.)

The membership voted on November 7, 2013 and ratified what was understood by the Union to be the terms that would be incorporated in the new 2013-2016 CBA. (Sullivan, Tr. at

432:4-7.) It is important to note that Sullivan did not expect an automatic ratification from the membership. He testified that he presented the highlight sheet to the membership and met with all three shifts at the Company's facility about it so "that we could discuss, pick apart, yeah, hooray, or say no to any of the changes that were made at the negotiating table." (*Id*. at 431:20-23.) Sullivan, therefore, fully contemplated the possibility that the membership could reject the terms the parties reached during bargaining and send the negotiation team back to the table.

G. The "Final" Contract

After the October 31 negotiation session and after the November 7 ratification vote, a completed, printed version of the contract was still to be created. Kiersten Dellert, the Company representative responsible for maintaining drafts of the contract as bargaining progressed, abruptly resigned on or about November 11, 2013 with little notice. (Roberts, Tr. 339:12-23.) On that day, she left Jon Roberts with the last draft of the contract that had been developed up to that time. (*Id*. at 339:25 to 340:1, 353:6-9.) The draft of the contract that Dellert left with Roberts still had changes and additions to be made to it. According to Roberts, among the needed changes was the addition of the Certification Program and a revised Article VIII, Section 3, a revision Roberts characterized as the "primary change." (*Id*. at 342:21 to 343:15, 355:25 to 356:4.) Roberts explained this by saying: "The Certification became—you know—a big topic of discussions. So, really we had gotten most of that draft stuff completed for that time. The piece that was not in there was the certification language." (*Id*. at 338:6-10.)

Roberts made what he believed to be the remaining changes to the contract draft that Dellert left with him on November 11, revising the language of Article VIII, Section 3 of the 2010-2013 CBA as he did so. The revised provision read as follows:

Step Rates and Progression Schedules

The Union recognizes that starting rates, progression rates, and job

> rates for hourly rated will vary, depending on the job and its surrounding circumstances. Employees hired after January 1, 2014 will follow the progression rates and job rates in effect as of January 1, 2014 and as defined in the Cross Training Certification Program. Employees hired before December 31, 2013 will follow the progression rates and job rates presently in-effect.

(Ex. GC-15, p. 11)

The Union never agreed to the revised Section 3 of Article VIII. (Sullivan, Tr. at 454:3-23.) The Union did not want Article VIII, Section 3 as it appeared in the 2010-2013 CBA to change. (*Id*. at 455:7-10.) The language that Roberts inserted into the contract at Article VIII, Section 3 was never proposed or exchanged during the negotiation process. (*Id*. at 457:6-10.)

The Company produced no drafts of the 2013-2016 CBA which contained proposed language revising Article VIII, Section 3. Nor did the Company produce any bargaining notes. Anthony Brown testified that as soon as he understood the contract to have been ratified, he discarded all his contract drafts and notes. (Brown, Tr. at 123:3-11.) Kiersten Dellert, who was the keeper of notes and drafts throughout the negotiations, had abruptly resigned and apparently left no bargaining notes. Brown testified that he discarded hard copies of drafts that he had in his possession, but also testified that drafts were electronically stored. (Brown, Tr. at 122:22-24). Presumably, these electronically stored drafts could have been retrieved, printed, and produced, but they were not. Brown testified that during negotiations the Company generated contract drafts showing changes that were color-coded in red and green. When asked about whether such drafts would be offered as exhibits, Brown testified that the Company had none. (Brown, Tr. at 121:16-22).

As recounted above, the Company's witnesses testified that clarifying the contract's language was an important priority from the start of the negotiations. (Roberts, Tr. at 287:10-18.) As illustrated by the chart below, drafts of the CBA that were produced show quite clearly where

the parties discussed language changes; some of the proposed changes were minor, others more substantive.

Proposed Language Revisions During the 2013 Negotiations						
CBA Art. / Sec.	**Article or Section Title**	**Language in 2010-2013 CBA (Ex. GC-2)**	**Language in 2013-2016 CBA (Ex. GC-21)**	**Draft (Ex. R-1) Page No.**	**Other Drafts & Page Nos.**	**Language Change/Proposal**
Art. VII Sec. 6	Night Shift Differential	p. 5	p. 9	VR-531	Ex. R-23, 9th pg.	Language in 2010-2013 CBA about "IMI employees accepting VR positions" being "grandfathered" did not make it into 2013-2016 CBA.
Art. VII Sec. 8	Division of Overtime	p. 6	p. 10	VR-532	Ex. R-21, p. 10	Drafts contain longer proposed provision which includes qualifications for overtime and reference to "employee certified for job." This language did not make it into 2013-2016 CBA; the 2010-2013 CBA language remained unchanged.
Art. IX	Service Credits, Seniority	p. 7	p. 11	VR-533	Ex. R-21, p. 11 Ex. R-23 11th pg.	Proposal in drafts to reduce number of permissible days of absence from 10 to 2 days. Remains 10 in 2013-2016 CBA.
Art. X Sec. 1	Upgrading & Job Posting	p. 8	p. 13	VR-534	Ex. R-22, p. 12	A new subsection "J" was added into the 2013-2016 CBA and was not in the 2010-2013 CBA.
Art. XI Sec. 1(b)	Transfers, Reductions or Increases in Force	p. 9	p. 14	VR-535	Ex. R-21, p. 13	Proposed drafts include the phrase "as a result of reductions in force," however that language did not make into 2013-2016 CBA; old language stays same.

Proposed Language Revisions During the 2013 Negotiations						
CBA Art. / Sec.	**Article or Section Title**	**Language in 2010-2013 CBA (Ex. GC-2)**	**Language in 2013-2016 CBA (Ex. GC-21)**	**Draft (Ex. R-1) Page No.**	**Other Drafts & Page Nos.**	**Language Change/Proposal**
Art. XIV Sec. 4(a)	Arbitration	p. 15	p. 21	VR-542	Ex. R-23, 21st pg.	Drafts contain this proposed sentence: "Alternatively, either party can raise objection to the arbitrator and let him/her decide." Sentence was not added to 2013-2016 CBA; stayed as it was in 2010-2013 CBA.

As demonstrated in the examples from the above chart, the drafts show specific language that was proposed and how the language changed (or not) from one contract to the next. No draft shows any change to the language of Article VIII, Section 3.

The Company was unable to produce any notes that reflect the Union's consent regarding the Certification Program. (Brown, Tr. at 236:18-21.) The supposed agreement to replace the language in Article VIII, Section 3 was not memorialized anywhere—there was no memorandum of understanding or memorandum of settlement or tentative agreement setting forth the Union's consent to the new language of Article VIII, Section 3. (*Id.* at 236:24 to 237:7.) In short, there was no written indication anywhere that the Union agreed to replace the language of Article VIII, Section 3 of the 2010-2013 CBA. (*Id.* at 237:8-10.)

The Union, by contrast, produced bargaining notes showing discussions regarding the proposed Certification Program and specifically demonstrating the Union's opposition to the Certification Program. On a copy of the Company's October 1, 2013 chart-summary of proposals, Sullivan wrote next to the "Certification" box: "out of contract." (*See* Ex. R-17a; emphasis added.) When asked what he meant by that notation, he explained as follows: "But I

was not going to allow [the Certification Program] to be a contract item because there were too many parameters that were—that I had no clue of." (Sullivan, Tr. at 415: to 416:10.) "And with so many unexpressed parameters on the Certification Program," he added, "there was no way that I would allow it to be any part of the contract." (*Id*. at 416:20-22.) Sullivan testified that he expressed this view to the Company during negotiations. (*Id*. 415:24 to 416:2.)

Moreover, Sullivan made clear that "out of contract" did not mean merely keeping the details of the program out of the contract and allowing a reference to the program to be a contract provision. (*Id*. at 416:23 to 417:9.) "Out of contract" meant that the Certification Program was not an initiative that the Union agreed to incorporate in the terms of the 2013-2016 CBA. Also, in bargaining notes produced by the Union, another copy of one of the Company's proposal chart-summaries, the one presented by the Company at an October 4 bargaining session, was marked by Brian Sullivan with the notation "O.O.C.," again in the box labeled "Certification." (*See* Ex. R-17, p. 11.) When asked what that notation meant, Sullivan explained—again—that the notation meant "out of contract." (Sullivan, Tr. at 426:11-12.)

The working drafts of the agreement developed during the four months of negotiations that were received into evidence—from both the Company and the Union—contain not one word of difference between the old Article VIII, Section 3 (the provision the Union wanted to preserve) and the newly inserted language of that same provision. The new language of Article VIII, Section 3 appears for the first time in a draft produced after the parties met for the final bargaining session, after the Union submitted the new contract for a vote to its membership, and after the new contract was ratified by the members.

Anthony Brown testified that the Company shared edited drafts of the CBA with the Union during the course of negotiations. (Brown, Tr. at 45:16-24.) Thus, there was a practice of

sharing edits and providing changed language to the Union. Nevertheless, the language that would eventually make its way into the new version of Article VIII, Section 3 never materialized from these exchanges.

H. <u>The Union Reviews the Contract</u>

Jon Roberts testified that after making the changes to the contract that Dellert left with him on November 11, 2013, he emailed the draft to Brian Sullivan on November 20. (Roberts, Tr. at 343:9-15; *see* Ex. GC-15.) There is conflicting testimony about this. Sullivan testified that the contract with Roberts' changes was hand-delivered to him by John Stewart in November. (Sullivan, Tr. at 444:10 to 445:1.) In any event, Sullivan reviewed the contract draft he received from Roberts for the changes that he understood to be the agreed-upon changes. (Sullivan, Tr. at 436:23 to 439:6.) There was no indication in the draft of the contract or the November 20 email message that any change had been made to Article VIII, Section 3 or that Section 9 had been added to Article VII. (*Id*. at 445:6-13.)

Sullivan performed his review of the contract using a checklist that he prepared for himself, which set forth those Articles and Sections of the old 2010-2013 CBA which were changed pursuant to the 2013 negotiations. (Sullivan, Tr. at 433:25 to 434:11, 435:12-18, 436:7-11, 438:24 to 439:20; Ex. R-20.) He used the checklist to go through the contract draft that he received from Roberts and to confirm that the negotiated changes to the contract were included in the draft he received to review. (*Id*.) As Sullivan went through the draft, he initialed the provisions containing language to which the parties agreed during bargaining. (*Id*. at 438:16 to 439:20.) Among the provisions Sullivan reviewed and initialed were Article VIII, Section 2 and Section 4 (regarding the cost of living adjustment). (*Id*. at 439:21 to 440:3.) Sullivan's checklist, however, did not list any agreed-upon change to Article VIII, Section 3, where the Certification Program was inserted by Roberts. (Sullivan, Tr. at 436:12-16; Ex. R-20.) The provision was not

included on the checklist because it was not one of the negotiated and agreed-upon changes to the 2010-2013 CBA. (*Id.* at 436:15-19.) Therefore, Sullivan's initials in Article VIII do not reflect his assent to any changed language in Section 3. (*Id.* at 440:4-7.)

Sullivan's review of the contract draft he received from Roberts revealed that there were still substantive changes to be made to the document. For example, on page 36 of the draft, Sullivan noticed that the section setting forth the pay for each calendar year of continuous service listed the old hours from the 2010-2013 CBA, hours which the parties had changed during the course of negotiations. (*See* Ex. GC-18, p. 36.) Sullivan made handwritten changes to that page of the draft, changing the hours to those the parties agreed to and adding the following handwritten notations: "not agreed to" and "change to appropriate hours." (*Id.*) Thus, the draft that Roberts sent to Sullivan was not a final document.

After initialing those places where he noted agreed-upon changes and making handwritten edits to the document, Sullivan signed the draft before sending it back to Roberts. Sullivan signed the document as a means of certifying that the initials and the changes that appeared on the document were his. (Sullivan, Tr. at 448:1-8.) He did not sign it to indicate agreement with the document and he did not think that he was signing a finalized contract when he signed it. (*Id.* at 9-17.) Sullivan explained that he was "signing an edited option [*sic*] that had to go back to be redone and then resent back down to me. I would have had to do the same thing to the next one. All that I was doing is I identified various changes." (*Id.* at 9-16.)

Certain handwritten notations on Sullivan's checklist further demonstrate that the contract draft that Sullivan reviewed was not the final contract and there was more to be done before the 2013-2016 CBA was finalized. The second page of the checklist contained a handwritten notation that said "changes to be made." (Ex. R-20, p. 2.) There was also a

handwritten note to "get:" (1) a date for revision, and (2) a signing date. (*Id.*; *see also* Sullivan, Tr. at 447:11-21.) When asked about a "signing date," Sullivan explained that he had mentioned to Anthony Brown that the parties should finalize the contract by fixing a date on which the parties convene to sign a final contract. (Sullivan, Tr. at 447:16-21, 448:18 to 450:3.) Brown acknowledged Sullivan's request for a formal signing ceremony and did not object. (*Id.*; Brown, Tr. at 524:16-21.)

On December 10, Roberts received the contract draft containing Sullivan's initials and notations. (Roberts, Tr. at 321:9-23; *see also* Brown, Tr. at 128:7-10.) The very next day, Roberts emailed Sullivan, informing him that he and Matt Couture had signed off on the manually-edited contract that he received the day before. (Ex. GC-19.) One day after that, on December 12, Roberts emailed the Company's employees, ostensibly to notify them that the new contract had been signed. (Ex. GC-20.)

On February 2, 2015, Anthony Brown emailed Sullivan the section of the contract entitled Summary of Employee Benefits (which starts on page 46 of the draft Roberts provided Sullivan on November 20 (Ex. GC-15)) with a number of changes to the provisions in that section. (*See* Ex. R-14.) The message in the February 2, 2015 email indicated, among other things: "In addition I have included the corrections to the contracts in regards to the benefits portion for you to review as well." (Ex. R-14, p. 1.)

I. No Agreement on Certification Program

When the Union expressed its opposition to the Company's proposal, in terms that were largely unambiguous, the Company dismissed the Union's position as "posturing," and evidently proceeded to include the disputed program in the new contract. When asked about Sullivan's response, Roberts testified that he "saw the response as being[,] coming from Brian [Sullivan]." (Roberts, Tr. at 316:3-6.) He elaborated: "Coming from Brian—so I thought—you know—my

impression was that this was a little bit of posturing. I'm going to try to—you know—see where we can push the envelope a little bit further from the Union perspective." (*Id*. at 316:10-14.)

Despite the Union's unequivocal opposition to replacing the progression step wage increases with the proposed program, the Company presumed that the Union could not possibly expect that both the Certification Program and step increases co-exist. In responding to the question of what were the Union's express terms of consent to the Certification Program, Anthony Brown answered that the Union consented because to do otherwise would have produced what he viewed as an unfavorable result:

> Q: Can you tell us then what was said by the Union to express the consent to have the certification program replace the step progression increases?
> A: Yes. Because if you gave the—we had the talk about the dollar an hour increase for new employees versus the 25 cent an hour for existing employees. So that would give them the competitive wage rate at the end. And if it was meant to be on top of the existing wage scale, then that would make the new employees the highest paid employees in the plant and the Union would never go for that.

(Brown, Tr. at 231:23 to 232:7.)

The reasonableness of the co-existence of the progression rates and the Certification Program notwithstanding, it was clear that the Union's position was, and still is, that the proposed Certification Program was not to replace the progression step increases for the 2013-2016 term.

J. The Company Implements the Certification Program

In the spring of 2014, the Company hired new employees. The new hires of 2014 were told by the Company's Human Resources Manager Diane Igoe that they should expect the progression step wage increases that were set forth in the old 2010-2013 CBA. (Igoe, Tr. at 379:12 to 380:11; Brown, Tr. 253:1-19.) Ms. Igoe provided them with paperwork which included a page where she handwrote a list of the wage increases and the dates on which they

were expected. (*See* Ex. R-15a, p. 3 and 5; *see also* Ex. R-15b, p. 6; Igoe, Tr. at 382:18 to 383:21.) In the fall of 2014, following the 7-month period marking the progression step increase for one of the new hires, the new employee did not receive the expected increase. (Igoe, Tr. at 379:20 to 380:21.) The 2014 new hires began to inquire about the progression step increases. (Brown, Tr. at 254:4-8.) The situation was explained to the new employees; they were informed by the Company of the new wage schedule that the Company was currently following. (Igoe, Tr. at 380:22 to 381:5.)

This episode caused the Union to realize that a key provision to the collective bargaining agreement had been changed. (Sullivan, Tr. at 455:11 to 456:9.) Because the new employees received the "wrong" information from the Company when they were hired in the spring of 2014, the Union had no reason to believe that the Certification Program to which the Union had objected throughout negotiations was actually put into effect. This development sparked the dispute between the Union and the Company regarding what each understood to be the terms of Article VIII, Section 3 for the 2013-2016 contract. It was then that the Union realized that the Company had made the Certification Program a part of the 2013-2016 collective bargaining agreement.

The Union filed grievances protesting the Company's implementation of the Certification Program. (*See* Exhs. GC-24, GC-25, R-24a.) As the dispute progressed, the Company sent contracts to the Union for signature. The Company sent Brian Sullivan a letter dated February 6, 2015, which included with it a copy of what the Company understood to be the contract in effect and requesting the Union to sign the enclosed contract. (Brown, Tr. 198:25 to 199:11; *see* Ex. R-12.) However, the copy of the contract included with the Company's February 6, 2015 letter to Sullivan was the one bearing Sullivan's handwritten changes from the fall of 2013, with the

notation "not agreed to." (Ex. R-12, p. VR-0320.)

On April 8, 2015, the Company again sent the Union a letter with a copy of the contract attached and a request to the Union to sign it. (Brown, Tr. at 201:21-25; Sullivan, Tr. at 484:25 to 485:1; *see also* Exhs. R-13a and 13b.) Unlike the version of the contract sent to the Union with a request to sign on February 6, 2015, the April 8 contract draft incorporated in print the handwritten corrections that Sullivan had applied to the draft he was given on November 20, 2013. However, the version of the contract sent on April 8, 2015 did not contain the corrections to the contract that Anthony Brown had emailed to Sullivan two months earlier on February 2, 2015. As late as April 8, 2015, therefore, a final contract still had not been put together. Contract booklets that were printed in the first half of 2014 do not contain the corrections that Brown emailed to Sullivan on February 2, 2015. (*See* Ex. GC-21.)

The Union remained opposed to adding an incomplete an undeveloped Certification Program to the contract throughout negotiations, and maintained that position until the end of the bargaining sessions. On November 24, 2014, in response to one of the grievances that the Union filed, Anthony Brown wrote: "The second mentioned item in the grievance was the Cross Training [Certification Program] wording which is still in process of being defined and being discussed with the Union leadership." (Ex. GC-24, p. 5.) Brown was asked about this at the January 2016 trial:

> Q: So in November of 2014, a year out from these discussions or more than a year out from these discussions, the certification program was still in the process of being defined?
> A: Yes. And still is today.

(Brown, Tr. at 238:14-17.)

ARGUMENT

MEETING OF THE MINDS

"It is well settled that Section 8(d)'s obligation to bargain collectively requires either party, upon the request of the other party, to execute a written contract incorporating an agreement reached during negotiations." *Windward Teachers Assoc., NYSUT, AFL-CIO*, 346 NLRB 1148, 1151 (2006). "However, this obligation arises only after a 'meeting of the minds' on all substantive issues and material terms has occurred." *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004) (emphasis in original); *see also Sunrise Nursing Home*, 325 NLRB 380, 389 (1998).

"The General Counsel bears the burden of showing not only that the parties had the requisite 'meeting of the minds' on the agreement reached but also that the document which the respondent refused to execute accurately reflected that agreement." *Windward Teachers*, 346 NLRB at 1151. "If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of the Act." *Id*. However, "[w]here the parties have agreed on the contract's actual terms, disagreements over the interpretation of those terms do not provide a defense to a refusal to sign the contract." *Id*.

"Whether the parties have reached a 'meeting of the minds' is determined 'not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other.'" *Chauffeurs, Teamsters and Helpers, Local 771*, 357 NLRB No. 173, at *21, Dec. 31, 2011 (emphasis added; citations omitted). "In determining whether parties agreed to a contract, the Board is not bound by technical questions of traditional contract interpretations. Rather the Board is free to use general contract principles adapted to the collective-bargaining

context to determine whether the two sides have reached an agreement." *Stroehmann Bakeries, Inc.*, 289 NLRB 1523, 1525 (1988).

In cases where parties did not agree on the language of a contract, a judge may find that there was no meeting of the minds. *IBEW, Local 2326 and Vermont Tel. Co.*, 348 NLRB 1278 (2006). Thus, where union members ratify a contract containing wage proposals that differ from those offered by an employer, the result is a mistake over an essential element of the contract, and, consequently, there is no meeting of the minds over the essential element of wages. *Waldon, Inc.*, 282 NLRB 583, 586 (1986) ("I thus conclude that the membership through [the union's] error ratified a different wage proposal than that offered by [the employer], resulting in a mistake over an essential element of the contract. There was, thus, no meeting of the minds over this essential element of wages and there was, thus, no valid contract. I conclude that [the union] was mistaken in [its] understanding of [employer's] offer and in what [it] took back to the membership for ratification.") (citing *Apache Powder Company*, 223 NLRB 191 (1976)).

"The question of contract formation is based on the parties' expressed intentions regarding the terms of a collective-bargaining agreement, and this is true regardless of whether a document has yet been signed." *Sunrise Nursing Home*, 325 NLRB at 389.

As noted above, there are several points at which the Union and the Company showed that there was no meeting of the minds with regard to having the Certification Program, and the new wage schedule that comes with it, be implemented at the Company's facility in Schenectady.

First, there is the very simple fact that the Company claims that the Union consented to having the Certification Program replace the step progression wage increases of the 2010-2013 CBA. However, as detailed above, the Union's representatives maintained that while the Union

expressed interest in discussing the development of such a program, at no time did the Union agree that the 2013-2016 CBA contain any reference to the proposed Certification Program, nor did the Union agree that the program would be implemented. As evidence that the Union agreed to accept the Company's proposal regarding the Certification Program, the General Counsel offered the Company's witnesses who claimed that they believed the communications during negotiations resulted in agreement. The only documentary evidence provided to support the Company's belief was a series of chart-summaries prepared by the Company purporting to show that among the initiatives proposed and discussed at bargaining sessions, "Certification" was agreed upon by the parties. (*See* Exhs. GC-7, GC-8, GC-9, and GC-13.) However, all of these chart-summaries were prepared by one of the Certification Program's chief proponents, Jon Roberts. Moreover, in explaining whether the marks on the chart-summaries indicated agreement on a subject by both parties, Roberts essentially testified that when the Company believed there was "agreement," he noted so on the charts, and it is possible—though apparently not certain—that those indicators of agreement meant that the Union agreed also.

> Judge Ringler: So a checkmark meant consensus and no one protested that concept.
> A: Well, I guess that the checkmark meant primarily that we were in agreement with it. This is our document. So, we're presenting it as—okay, we're agreeing to these points. Now, <u>they may</u> mutually have already agreed to that point too. So for the most part, it <u>could</u> be both.

(Roberts, Tr. at 303:10-16; emphasis added.)

This perception was further clarified by the General Counsel's follow-up question:

> Q: And in that context, by ["]we["] you mean the Company?
> …
> A: Yes.

(*Id*. at 303:19-22.)

Roberts reiterated that this was the Company's perception when asked to clarify what the checks on the document he created meant. (*See* Roberts, Tr. at 346:1-16.)

Sullivan testified that the check marks that purported to show agreement did not necessarily mean that the Union agreed:

> Q: The same question for certification, the checkmark next to certification, what did that signify to the Union?
> A: To me that would be their opinion—that would be something that they looking [*sic*] to discuss and they really wanted.
> Q: Does the checkmark meant that the Union had agreed in one way or another with the proposal?
> A: Absolutely not, we never heard by then [*sic*].

(Sullivan, Tr. at 404:24 to 405:5; emphasis added.)

When asked specifically whether the check marks signified that the parties agreed that the Certification Program would be part of the new 2013-2016 CBA, Sullivan replied, "Not on the 1st, the 4th, the 17th [of October 2013], or whatever else." (Sullivan, Tr. at 407:20-22; emphasis added.) For Sullivan, the continued presence of a check mark next to "Certification" on the chart-summaries prepared by the Company indicated to him that, "They continued to want to discuss the feature of this and how we would implement it into a contract." (*Id*. at Tr. 407:3-7.) "We knew that we still needed to continue to discuss it," Sullivan explained. "We were unable to conclude any real methodology on how to implement it into the shop. Consequently, the checkmark in my opinion means that we need to continue to discuss the issue." (*Id*. at Tr. 407:15-19.)

Other than (1) the testimony of the Company's witnesses that the Union agreed to the Certification Program, and (2) the chart-summaries that the Company conceded showed the Company's view and not the Union's regarding acceptance of the program the Company

provided no evidence from the negotiations that the Union agreed to launch the Certification Program.

The Union, on the other hand, provided bargaining notes that were contemporaneous with the negotiations showing what it thought of the Company's proposal: the Union objected. After two months of discussing this proposal at negotiations—sometimes at length (Sullivan, Tr. at 487:21 to 488:2)—a mere week before the final negotiation session, the Company proposed the program again in an October 24 email to Brian Sullivan. (Ex. GC-10.) The Union responded to this email message in terms that clearly manifest that it did not agree with the proposal. (Ex. GC-11.)

The Company apparently chose to ignore the Union's opposition to the proposed program, preferring to believe that the Union's response was only "a little bit of posturing," a way for the Union to "see where we can push the envelope a little further." (Roberts, Tr. at 316:3-14.) But "pushing the envelope a little further" in the context of negotiations should not be regarded as taking a position that is utterly dismissible. Roberts' dismissal of what he perceived as "posturing" by the Union during negotiations should not be rewarded by permitting the Company to deny that the Union objected to the Certification Program. The Company cannot now be heard to accuse the Union of refusing to sign a contract which includes a provision the Company inserted after it absolutely ignored a valid negotiation stance by the Union.

Moreover, at trial at least seven drafts of the CBA were presented that were generated during the course of negotiations, and not one of those drafts contains any change to Article VIII, Section 3. The General Counsel made the point that the drafts could have been created at any time during negotiations and while this is true, the Company, which maintained drafts as negotiations progressed, failed to produce a single draft that showed Article VIII, Section 3

revised in any way, or that showed the new Article VII, Section 9. During the trial, when asked approximately how many contract drafts were presented to the Union, Jon Roberts testified that it was "probably four or five—you know—maybe it was six." (Roberts, Tr. at 337:14-21.) The Company produced four drafts; the Union provided three more copies. Based on Roberts' testimony, there might be more. Nevertheless, the General Counsel has the burden of proof and it has failed to produce any drafts that show that the language of Article VIII, Section 3 was altered in any way during negotiations.

Also, the "highlight sheet" that Sullivan presented to the membership for a vote shortly after negotiations ended on October 31 did not include the Certification Program as one of the new provisions to be included in the 2013-2016 CBA. Sullivan testified that the provision was not on the highlight sheet because the Union did not agree to it. Moreover, he made clear that he was not necessarily expecting the membership to automatically vote for the contract represented by the highlight sheet; he contemplated the possibility of dissention and was prepared to discuss with the membership any concerns they might have with the proposed new contract. The absence of the Certification Program on the highlight sheet, therefore, could not have been to avoid dissention from the membership. The Certification Program was not on the highlight sheet simply because the Union never accepted the Company's proposal to include the program as a new component of the collective bargaining agreement between the parties.

Second, and perhaps even more demonstrative that there was no meeting of the minds, the parties apparently understood the term "out-of-contract" differently. As quoted in *Stamford Taxi, Inc.*, 1999 NLRB LEXIS 339 (N.L.R.B. May 20, 1999), from *Restatement Contracts* (1932), Section 501 ("When Mistake Prevents the Formation of Contracts"), Comment (b):

> If the misunderstanding is due to the fault of one party and the other party understanding the transaction according to the natural meaning of

> the words or other acts, both parties are bound by that meaning. If the misunderstanding is due to ambiguity for which neither party is to blame, or for which the parties are equally to blame, and parties differ in their understanding, their apparent agreement creates no contract under the rule stated in § 71.

Stamford Taxi, 1999 NLRB LEXIS 339 at *125 (emphasis added).

The Company claims it understood "out-of-contract" to mean that documentation that lays out the Certification Program would exist physically apart from the collective bargaining agreement, like the wage schedules do, but would be referenced in the contract. Under this arrangement, the parties would be bound to terms of the Certification Program, much like the parties are bound to follow the separate wage schedules. (Roberts, Tr. 281:22 to 282:7.)

The Company claims that the Union agreed to this arrangement despite the fact that the Certification Program was a largely undeveloped initiative that would need a year to develop. This reality regarding the development of the Certification Program is firmly established by the testimony summarized above. If the Company is to be believed, a significant number of the several sessions during which the parties discussed the Certification Program were spent haggling over whether to incorporate the Certification Program documentation into the contract. The Company acknowledged that such documentation about the Certification Program did not even exist in the fall of 2013. If the Company's testimony regarding a "separate document" justification is to be believed, the Union agreed rather early in the negotiations to implement a vaguely defined program and spent a number of weeks fighting the Company over whether to include the details of the program (as yet undefined) in the body of the contract. Such a prolonged dispute over this issue—in light of a past practice of having a separate document for the wage schedule—would have been a bizarre expenditure of the Union's time and resources, especially as the Company expressed many times that it did not have all the details worked out

for the Certification Program.

Despite these firm and undisputed assertions by the Company that its proposed Certification Program was an as of yet undeveloped initiative, the Company insists that the Union—aware that the program was not fully developed—agreed to bind itself and its membership to a set of unknown obligations. The suggestion is simply implausible. Brian Sullivan is an experienced Union negotiator, the veteran of several negotiations with sophisticated employers over the past three decades. (*See* Sullivan, Tr. at 386:18 to 387:14.) The Union's witnesses, including Sullivan, made clear that the Union was not prepared to agree to be bound to the terms of an initiative that it had yet to fully understand. Union President Carmine Pallotolo expressed the Union's position succinctly: "We can't talk about something if we don't know how it's going to work." (Pallotolo, Tr. at 515:8-9; emphasis added.)

The Union maintained that "out-of-contract" meant that the Union objected to the inclusion in the 2013-2016 CBA any provision about the Certification Program because the Union did not agree to have the program replace the step progression wage increases for the 2013-2016 term. This was especially true, explained the Union witnesses, where the Company's proposal for the Certification Program left many unanswered questions that the Union believed were crucial to understand before it could agree to put such a program in place.

With these two differing views of what "out-of-contract" meant, the Company inserted a new Section 9 to Article VII, which made reference to the Certification Program, and revised the language of Article VIII, Section 3 to have the Certification Program replace the step progression wage increases for the 2013-2016 CBA. This outcome is not what the Union meant "out-of-contract" to mean.

Third, the Company made demands that the Union sign the contract despite the absence of a final contract. According to Jon Roberts, when negotiations ended on October 31, 2013, it was understood that certain "housekeeping" changes remained to be made to the contract before it was finalized. He sent a draft of the contract with such changes applied to Brian Sullivan on November 20. That draft did not reflect the agreement between the parties, not only because provisions about the Certification Program were inserted into it unbeknownst to the Union, but also because certain service hours that had been revised pursuant to negotiations were not reflected in the November 20 draft that Roberts sent to Sullivan. When Roberts received the edited draft from Sullivan in December, Roberts acknowledged that the changes had to be made. The email messages he sent to Sullivan over the next two days, however, make no mention of these changes being applied to a final contract. The messages only prod Sullivan to sign the contract and then purport to give notice to the Union that a signed contract has gone into effect.

The Company's silence on the addition of that provision is telling. The Certification Program was an initiative about which Company representatives met to discuss even before the parties convened for negotiations. (Brown, Tr. at 46:18 to 47:2; Roberts, Tr. at 293:16 to 294:4.) The Company acknowledged that the inclusion of the Certification Program into the 2013-2016 CBA was a substantive change to the contract. (Brown, Tr. at 177:14 to 178:7.) The Company viewed the program as a benefit to both sides. (Roberts, Tr. at 295:1-9.) The Company also viewed the proposed program as a way to slow down the wage increases that were built into the 2010-2013 CBA, an obvious cost-cutting measure. (*Id*.) The Company invited a retired engineer to return to the facility to assist in implementing the program. (Brown, Tr. at 242:13-24, 244:9-12.) The Company apparently made significant effort, after the negotiations, to continue developing the program, as evidenced by the substantial amount of documentation the Company

generated regarding the Certification Program in 2014. (Sullivan, Tr. at 485:22 to 486:11.) Once the Certification Program was proposed, the Company raised the issue at the subsequent negotiation sessions, at times discussing the matter at length (Sullivan, Tr. at 487:21 to 488:2). Yet, despite the importance conferred on this proposed program, there is absolutely no mention in Roberts' November 20 email message to Brian Sullivan that the draft of the attached contract includes provisions about this program. One would think that the Certification Program would warrant such mention, if only to avoid the type of misunderstanding that is the subject of these proceedings.

Further, on the issue of the final contract, the Company witnesses identified a draft of the contract containing changes that had yet to be made as the "final" contract. (Ex. GC-15; Brown, Tr. at 217:13 to 218:20; Roberts, Tr. at 320:15-23.) In mid-December of 2013, Roberts accepted the changes that Sullivan made to that "final" contract. In February of 2015, over a year later, Anthony Brown sent Sullivan a draft of a portion of the "final" contract containing a number of changes to the section on health benefits. Thus, there was no final contract when the Company claims there was.

To rebut the Union's position that the Union expected a final contract to be signed by all the parties at a time set aside for the occasion, the General Counsel makes much of an apparent past practice to apply typed "signatures" to the final printed edition of the contract. However, when asked by the General Counsel why a final contract had not yet been signed by the end of November, Company witness Anthony Brown responded that, "People had been on vacation. Kiersten [Dellert] had left. So the final version had to be put together, and then everyone had to sign it and make rounds to get signatures." (Brown, Tr. 126:20-25.) While not the "signing ceremony" that Sullivan asked Brown to arrange, this testimony from Brown belies the notion

that formal signatures from the parties involved were never required, and shows, again, that a final contract did not exist in late November, approximately a month after the last negotiation session.

K. Distinguishing the General Counsel's Cases

During his opening remarks, counsel for the General Counsel cited cases regarding whether parties arrived at a meeting of the minds. However, the facts of those cases differ markedly from the facts here.

(1) Windward Teachers

In *Windward Teachers*, cited by the General Counsel, a "Stipulation of Agreement summarizing the issues on which the parties had agreed" was created which contained a clear provision memorializing the position of the parties. The language at the center of the dispute in *Windward Teachers* was actually presented to the Respondent at the final negotiation session, where the Respondent had an opportunity to review and comment on the actual language at the negotiation table.

Here, as has been noted numerous times above and during testimony, there was no explicit language exchanged or even discussed regarding the Company's proposed Certification Program. Moreover, in *Windward Teachers*, the language discussed by the parties in a Stipulation of Agreement was "incorporated … verbatim into a successor collective-bargaining agreement." *Windward Teachers*, 346 NLRB at 1150. Again, specific language—exchanged and discussed by the parties—was inserted into a contract, unchanged. That did not happen in this case. Also, the decision in *Windward Teachers* noted "More importantly, the Respondent reviewed several versions of the contract without objecting to the terms of the bonus clause that were identical to the terms that the Respondent challenged in the draft successor collective-bargaining agreement language submitted to it October." *Id*. at 1151 (emphasis added). The

decision further noted, significantly, that, "The Respondent thereby consented to the integration of that language into the complete agreement." *Id.* (emphasis added). In *Windward Teachers*, the disputed clause, therefore, did appear in drafts the parties could review prior to making an agreement:

> The bonus clause provision appeared as article XII(K) in three separate documents, including the September 3 draft Stipulations of Agreement, the September 5 revised Stipulation of Agreement, and the successor collective-bargaining agreement. In the first two documents, the bonus provision, in plain language, states, "A new Paragraph K shall be added which shall read as follows …

(*Id*.)

Here, Jon Roberts testified that the new language of Article VIII, Section 3 of the 2013-2016 CBA was not yet in any draft of the contract reviewed by the Union before December. (Roberts, Tr. at 342:21 to 343:15.) Therefore, when the parties met for the last time and shook hands on what they believed to be a completed agreement, the language replacing the progression step wage increases with the Certification Program did not exist in a writing that the Union was able to review and upon which the Union could comment or to which it could object.

In fact, one of the reasons advanced by the Administrative Law Judge ("ALJ") in *Windward Teachers* that the Board rejected was "evidence that the Respondent's assent to the bonus language in the final agreement was based on its good-faith failure to notice the 'problem with the bonus language' until its members saw the final collective-bargaining agreement in mid-October." *Id.* Again, here there was no problem language for the Union to notice prior to the final October 31 meeting and handshakes and the November 7 ratification vote.

The Board also rejected a finding by the ALJ in *Windward Teachers* that the parties held conflicting subjective interpretations of the meaning of the language in dispute that the parties agreed to incorporate into a final agreement. *Id*. This is key because the Board ultimately found that, "The Respondent's disagreement with the School over the scope of the bonus clause

contained in that agreement is a dispute over interpretation, which does not justify the Respondent's refusal to execute the agreement," and consequently, the "Respondent's refusal to sign the agreement violated Section 8(b)(3) of the Act." *Windward Teachers*, 346 NLRB at 1152. Again, here, there are no conflicting subjective interpretations of the language of Article VIII, Section 3—the language inserted by the Company after the final October 31 meeting and after the Union's ratification vote was not reviewed by the Union and when the Union did learn of its insertion into the 2013-2016 CBA, it did not interpret the language any differently than the Company did.

(2) Rockwood & Co.

In *Rockwood & Co.*, 277 NLRB 769 (1985), the decision noted that: "[T]he Union notified the Respondent that … [it] accepts the company's final offer as outlined in your letter of August 24, 1983 and reaffirmed at the meeting of September 20, 1983 and in the September 21, 1983 letter of [employer]." *Rockwood*, 277 NLRB at 770. Again, this is a significant and substantial departure from the facts in this case. Here, Sullivan communicated his disagreement in response to an email from Jon Roberts which claimed that the parties agreed on the Certification Program. (*See* Ex. GC-11.) There was no affirmative statement from the Union stating its assent to the proposed Certification Program. Moreover, the facts of *Rockwood* showed that the union—which sent the letter accepting the company's offer—would be in contact with the company "to put together language reflecting the agreement." *Rockwood*, 277 NLRB at 770. This did not happen here. Also, importantly, regarding one of the issues about which the parties disputed in *Rockwood*, the Board found:

> With respect to the health and welfare proposal, the record indicates that the Respondent provided the Union with a complete health and welfare plan on 8 September; indeed, the Respondent in its 21 September letter to the Union referred to the health and welfare package that was presented to the Union "on September 8 in detail." Nor has the

> Respondent itself contended that the health and welfare proposal was other than fully complete.

Rockwood, 277 NLRB at 770. The Board in *Rockwood* "disagree[d], therefore, with the judge's finding that any essential details were lacking from the health and welfare proposal when the Union accepted it on 11 October." *Id*.

Here, that is absolutely not the case—there was no such complete package. Moreover, unlike the respondent in *Rockwood* which "itself contended that [its proposal] was other that fully complete," here, the Company acknowledged on several occasions—during negotiations and throughout the testimony of its representatives—that the Certification Program was far from fully developed.

Further, while the decision in *Rockwood* concluded that the company's proposal which did not contain all the "administrative details," was not fatal to finding a meeting of the minds, the decision also found that: (1) the incomplete proposal contained all the material provisions the union in that case needed to understand the proposal, (2) the plan proposed by the company was substantially similar to a plan already in place and from which the union could ascertain the missing details, and (3) that any missing aspects could be bargained for later. *Rockwood*, 277 NLRB at 770. The first two of those factors are not present in the case at bar: (1) Brian Sullivan and Carmine Pallotolo both testified that the Union lacked important information regarding the proposed Certification Program; the Company witnesses admitted several times that the Company was still working out the program's details; (2) there was no existing program at the facility that the Union could use to fill in the blanks of the Company's proposal; the Certification Program was a new initiative and there was no similar program in place with which to compare it.

As for the third factor in the *Rockwood* case—that the parties could bargain later on

pieces of the plan that were not fully developed—that is a fair and reasonable conclusion where the union (as it did in *Rockwood*) agreed to accept the company's offer to implement the plan the company proposed. Despite the Company's assertion to the contrary, that is not the case here—at no time during the 2013 negotiations did the Union accept to put into place the Certification Program that the Company proposed. The Union's good-faith consent to discuss the development of such a program was not an invitation to set up a program that was not fully developed and which would replace an established wage schedule that the Union found favorable to its membership.

(3) Sunrise Nursing Home

Sunrise Nursing Home makes clear that: "The question of contract formation is based on the parties' expressed intentions regarding the terms of a collective-bargaining agreement, and this is true regardless of whether a document has yet been signed." *Sunrise Nursing Home*, 325 NLRB at 389. But in that case there was language on which the parties had a subjective misunderstanding. Here, there was no such disagreement on proposed language. The language that was eventually inserted into the 2013-2016 CBA by Jon Roberts in December was never discussed during the fall bargaining sessions, let alone subjectively disagreed upon.

FRAUDULENT INDUCEMENT

Fraud in the inducement is shown when: (1) there is a "material misrepresentation of a presently existing or past fact;" (2) "an intent to deceive;" (3) "reasonable reliance on the misrepresentation;" (4) which results in damages. *Johnson v. Nextel*, 660 F.3d 131, 143 (2d Cir. 2011).

The Company made a material misrepresentation of a presently existing fact when it failed to disclose to the Union that despite vigorous objection during weeks of negotiation, language regarding the Certification Program had been inserted into the draft of the 2013-2016

CBA. Jon Roberts testified that in November 2013, after the last negotiation session which occurred on October 31, Company employee Kiersten Dellert, who was the keeper of contract drafts as bargaining progressed, resigned from the Company leaving the latest draft of the contract with Roberts. (Roberts, Tr. at 339:12-23.) The draft Dellert left with Roberts did not contain the language regarding the proposed Certification Program that ultimately became part of Article VIII, Section 3 of the 2013-2016 CBA. (Roberts, Tr. at 342:21 to 343:15) Roberts added that language, added a new Section 9 to Article VII, and emailed the draft to Brian Sullivan on November 20, 2013, without disclosing that material provisions about the Certification Program had been added to the contract. (*See* Ex. GC-15, p. 1.) The email message to which the November 20 draft was attached merely said that Sullivan should review "the revisions we have agreed to." (*Id*.)

As both Sullivan and Roberts testified, on the last day that the parties convened, it was understood by everyone that there remained "housekeeping" changes to be made to the contract. The "revisions we have agreed to" in the email message could have easily referred to those housekeeping matters. The Company never explicitly communicated to the Union that language regarding the Certification Program would be inserted into the 54-page contract. There was no memorandum of understanding or memorandum of agreement establishing the proposed Certification Program. The highlight sheet that Sullivan created to review the new contract with the membership for a ratification vote did not contain anything about the Certification Program because it was Sullivan's firm belief—based on the Union's repeated objections—that the Company heard and understood the Union's position and did not insert such a provision in the contract. (Sullivan, Tr. at 432:15-23.) The checklist Sullivan developed so he can review the contract draft for agreed-upon changes and confirm that they are in accord with those issues that

were, indeed, agreed upon did not contain anything about the Certification Program for the same reason: the Union opposed it and had no reason to believe that the Company would insert the term without notice to the Union.

The Company displayed an intent to deceive. The Company did not advise the Union of the newly inserted provision. Moreover, within two days of December 10, the date that Roberts testified that the Company received a copy of the November 20 draft reviewed by Sullivan and marked for further revision, Roberts had notified Company personnel that a contract had been signed and was in effect. (*See* Ex. GC-20.) This communication went out to Company personnel on December 12, two days after Roberts received the draft which noted that corrections needed to be made and that certain figures set forth in the draft were "not agreed to." (*See* Ex. GC-18, p. 36.) The Company was eager to put the contract into effect, despite the lack of finality, because the document contained the provision the Company desired—the revised Article VIII, Section 3.

The Union reasonably relied on the Company's misrepresentation. The Union relied on the Company's failure to notify it of the new language that was inserted in Article VIII, Section 3. The Union had no reason to think otherwise. The language that made its way into Article VIII, Section 3 never appeared on any draft exchanged by the parties during negotiations. (Sullivan, Tr. at 457:6-10; *see also* Exhs. R-1, R-21, R-22, R-23.) The Union understood that remaining changes to be made to the contract draft after the final negotiation meeting on October 31 were minor "housekeeping glitches" (Sullivan, Tr. at 421:1-19), not material changes. The Union relied on that belief, and the Company's failure to clarify that the changes would be any different.

The Union suffered damages as a result of the Company's actions. After the contract supposedly went into effect in 2014, the Company continued to inform employees hired as of

that year that they would be receiving the progression step increases of the old 2010-2013 CBA. When the new hires of 2014 did not actually receive the increases, the Company had to correct the information it provided to the new hires. A dispute arose thereafter between the Union and the Company regarding implementation of the Certification Program and the Union filed grievances on behalf of the employees who did not receive the increases. The Company continued to take the position that the Certification Program had been implemented, had taken the place of the old progression step wage increases, and as a result, newly hired employees were scheduled to receive their wages on a schedule different from the one the Union understood to be in effect. By the new schedule, however, new employees will take approximately six years to reach a wage comparable to one that some among them would have achieved in 18 months. The Union has been clearly damaged by this material change to its members' wages.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Administrative Law Judge find that there was no meeting of the minds between the Union and the Company regarding the 2013-2016 CBA.

Dated: February 19, 2016
New York, NY

Respectfully submitted,
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